Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

CLAUDE BURNETT,

Petitioner

VS.

ALABAMA NATIONAL GUARD
and ROGER PRIDMORE,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether the Eleventh Cirucit has decided an important question of federal law that has not been, but should be settled by this Court, more specifically whether this Supreme Court's decision in Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) superceded the decision in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971),

2. Whether the District Court and the Eleventh Circuit misapplied the test in Kitowski v. United States, 931 F.2d 1526 (11th Cir. 1991) and, therefore misapplied the test in Chappell, more specifically whether there was error in granting the Defendant's Motion To Dismiss For Failure To State A Claim Upon Which Relief May Be Granted, and whether the Eleventh Circuit erred in affirming the dismissal.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Northern District of Alabama (hereinafter referred to as the "District Court".) (per Blackburn, D.J.) granting respondent's Motion to Dismiss for Failure to State a Claim upon which Relief may be Granted is not published. The opinion court of appeals (hereinafter referred to as the "Eleventh Circuit".) (per Wilson, Tjoflat, Barkett, C.J.) affirming said dismissal is not published.

STATEMENT OF JURISDICTION

The Northern District of Alabama entered its order on September 6, 2000. The Eleventh Circuit entered it opinion and order on November 9, 2001. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case: Title 28 U.S.C. § 1331, Title 28 U.S.C. § 1343(a)(3), Title 42 § 2000-e(a), (b) and (m) and the Fourteenth Amendment of the Constitution of the United States of America. They are reprinted in the Appendix 16-a through 19-a.

FACTS OF THE CASE

Claude Burnett, along with other members of the Alabama National Guard, sought consideration to fill the

vacancy in the office of Command SGM 279th Signal Bn. Burnett's commanding officer, Respondent Roger Pridmore, forwarded every file of the applicants to the appropriate place, with the exception of Burnett's. Typically, it is the discretion of the commanding officer in determining whether to forward an applicants file to be considered for a promotion. Such discretion is afforded, however, only on the basis of that applicant's performance and qualifications. Burnett has an impeccable military record, replete with significant accomplishments. The other applicants under Pridmore's command were white and that they, even though some of them had less than two years of time in grade, were all given recommendations from Pridmore. Burnett's file, the file of the lone black applicant, was the only file not forwarded by Pridmore. Such action on the part of Pridmore was improper and based upon the fact that Burnett is black. Furthermore, Pridmore used his position to solicit the assistance of subordinate officers to take unfavorable actions against Burnett, i.e. give unfavorable ratings that were inaccurate. Such actions would have ruined the fine career that he has enjoyed, not only as an active duty soldier in the United States Army, but also as a reserve member of the Alabama National Guard. Having exhausted his remedies through the proper channels of the Alabama National Guard, Burnett had no recourse but to seek to redress his grievance in the courts. Attorneys for the Alabama National Guard filed a Motion to Dismiss For Failure To State A Claim Upon Uhich Relief May Granted pursuant to FRAP 12(b)(6). The United States District Court for the Northern District of Alabama granted the motion and dismissed the case as to both Respondents, holding that the matter was nonjusticiable in that this Court's holding in Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) superseded Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). Claude Burnett appealed to the United States Circuit Court of Appeals for the Eleventh Circuit. The Eleventh Circuit

dismissed the appeal for want of jurisdiction, and the matter was appealed again once the Eleventh Circuit obtained jurisdiction pursuant to 26 U.S.C. § 1291. After oral arguments, the Eleventh Circuit affirmed the dismissal. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Cirucit has decided an important question of federal law that has not been, but should be settled by this Court.

This matter warrants review, first, to determine the applicability of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). The dismissal of this case by the District Court and the subsequent affirmation by the Eleventh Circuit are premised on the idea that this Court's opinions in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed.2d 152 (1950), Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), and United States v. Stanley, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) setting forth tests to determine whether claims such as this are justiciable superseded Mindes, thereby rendering it inapplicable. The Petitioner would argue that Mindes was not superseded, but would likewise, for purposes of this petition, assert that there must be a final determination by this Court one way or the other.

The Respondents rely on Feres, Chappell, and Stanley. They assert that this Court held that "military personnel [are] not entitled to sue their superior officers for damages for injuries in the course of military service as a result of violations of constitutional rights." Defendant's Memorandum, 2. Their position suggests that this Court has precluded any type of action by uniformed service people against their superior officers, and that position is not entirely accurate. This Court in Chappell noted, from its opinion in

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), that "such a remedy is not available when 'special factors counseling hesitation are present.'" Chappell, 462 U.S. at 298, 103 S. Ct. at 2365. This Court's holding suggests that such a remedy *is* available in the absence of special factors counseling hesitation. In addition, this Court confirmed this stating, "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Chappell, 462 U.S. at 304, 103 S. Ct. at 2368.

The Petitioner has relied on Mindes to support that his claim is justiciable. Before going further, it is acknowled that the actual author of Mindes was the Fifth Circuit. However, Mindes was decided when the Fifth Circuit included the States of Alabama, Georgia and Florida, the States which now make up the Eleventh Circuit. In Bonner v. City of Prichard, 661 F.2d 1206, at 1207 (11th Cir.1981) (en banc), the Eleventh Circuit held that the decisions of the former Fifth Circuit rendered prior to October 1, 1981, would be binding as precedent in the Eleventh Circuit for that court as well as the district courts the circuit. Therefore, Mindes is binding precedent in the Eleventh Circuit and all courts thereunder.

Mindes sets forth a two-pronged test to determine whether a court should review internal military affairs. There must be (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." Mindes, 453 F.2d at 201. Mindes then sets forth a four-pronged test to be applied upon meeting the initial two-pronged test. These four factors to be weighed are (a.) the nature and strength of the plaintiff's challenge to the

military determination, (b.) the potential injury to the plaintiff of review is refused, (c.) the type and degree of anticipated interference with military function and (d.) the extent to which the exercise of military expertise or discretion is involved. Mindes, 453 F.2d at 201-202.

In Stinton v. Hornsby, 821 F. 2d 1537 (1987), the Eleventh Circuit addressed issues very similar to those in this case. Stinson, a black man, was a full-time member of the Alabama National Guard and was terminated approximately three years after his employment began. He brought an action under Title VII, alleging that the Alabama National guard "prohibited and refused to allow him the opportunity to gain a supervisory position, allowed other white employees with equal or fewer qualification and experience, to gain supervisory positions . . . ", and he alleged that these actions were based upon racial discrimination. Stinson, 821 F.2d at 1538. The Eleventh Circuit found the Mindes approach to be binding and remanded the case to the District Court for consideration under the tests set forth in Mindes. Stinson, 841 F.2d at 1540, 1541.

The first suggestion that Mindes might be superceded was in the specially concurring opinion of Senior Circuit Judge Henderson in Stinson. He noted that the Fifth Circuit rendered its opinion in Crawford v. Texas Army National Guard, 794 F.2d 1034 (1986), without relying on Mindes. Stinson, 821 F.2d at 1542 (Henderson, C.J., specially concurring). However, it is the majority opinion in Stinson controls unless it is overturned. Concurring and dissenting opinions indeed have their purpose throughout American jurisprudence, but even though they are at times interesting to read, they are not binding on the courts. Moreover, not even Crawford makes mention that Chappell superseded Mindes. The Fifth Circuit simply relied on the provisions of Chappell in the realization that Chappell made Mindes less likely to

apply in suits by enlisted people against their superior officers.

Rationale similar to that in Crawford was recently employed by the Eleventh Circuit. In 2001, the Eleventh Circuit handed down Speigner v. Alexander, 248 F.3d 1292 (11th Cir. 2001). Indeed language therein tends to lend credence to the idea that Chappell superseded Mindes. The court stated, "We no longer apply the test in Mindes . . . to determine justiciability in cases by members of the armed forces brought against the military if the claim is based on an injury incident to service." Speigner, 248 F.3d at 1295 n. 5. However, the court also stated that "claims still fall within Mindes that Stanley does not encompass-those involving 'internal military decisions' that are 'not incident to [a serviceman's] military service.'" Speigner v. Alexander, 248 F.3d at 1295 n. 5.

Much like the Fifth Circuit's rationale in Crawford, the Eleventh Circuit simply relied on the provisions of Chappell in the realization that Chappell made Mindes less likely to apply in suits by enlisted people against their superior officers. Chappell did not, however, supersede Mindes, and no precedent in either the Fifth or the Eleventh Circuit seems to suggest otherwise.

Moreover, Marvin Speigner, the Appellant when the matter was before the Eleventh Circuit has petitioned this Court for a writ of certiorari. To the best of the knowledge of the Petitioner herein, this Court has yet to rule on Speigner's petition. It would seem that if the Speigner petition were granted, then the Burnett petition should likewise be granted because the issues in each case are similar, and the granting of one with the denial of the other could leave inconsistent applications of law as well as inconsistent interpreations of

the role of the rules of law in the Feres, Chappell, and Stanley line of cases in the Eleventh Circuit.

Based upon the foregoing, it is apparent that this Court should grant the petition for writ of certiorari in an effort to render a final determination of the applicability of Mindes.

II. The Eleventh Circuit has misapplied its own test in Kitowski and therefore misapplied Feres, Chappell and Stanley.

This matter warrants review, also, because even if it could validly be said that Mindes is superseded, there was a misapplication of Feres, Chappell and Stanley by the Eleventh Circuit. This Court's holding in Chappell that a Bivens type remedy is not available in the presence of special factors counseling hesitation, as pointed out earlier herein, naturally suggests that such a remedy ***is*** available in the ***absence*** of such special factors. That is, if such factors are present, then the case may not be heard and must be dismissed, but in the absence of such factors, the case may in fact be heard. In Kitowski v. United States, 931 F.2d 1526 (11th Cir. 1991) and earlier in Pierce v. United States, 813 F.2d 349 (11th Cir. 1987), the Eleventh Circuit set forth a three prong test to determine the justiciability of claims such as this. Presumably, the meeting of this test indicates the presence of the special factors counseling hesitation. If, however, the three prong test is not met, then the special factors counseling hesitation are absent. In dismissing the Petitioner's complaint, the District Court noted the three prong test referenced in Kitowski. The District Court stated the three factors as "(1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of the injury. Kitowski, 931 F. 2d at 1528, 1529." The District Court stated

that as to the second and third factor, the test was met in that they were "clearly incident to plaintiff's military service". The Distrcit Court did not address the first element, the duty status of the service member. Instead the court acknowledged it as an essential element of the test but stated that the both the Petitioner and Respondent Pridmore "both engaged in purely military activity" when the Petitioner applied for the position and Respondent Pridmore did not forward Burnett's package. This, however, is not what the first prong demands. The duty status of the service member is what must be addressed, not whether one or more of the parties engaged in a military activity, if the three prong test is the proper test to employ. In addition, the three elements enumerated in Kitowski must be met before it may be said that the actions claimed to constitute a wrong arose incident to military service. "In applying Feres", the Eleventh Circuit has stated, "this court has identified three factors to be considered in determining whether the particular activity of a member of a military service at the time of injury is 'incident to service.'" Kitowski, 931 F.2d at 1528. In other words, the Eleventh Ciurcuit relies on the three factors enumerated in Kitowski as its interpretation of Feres, Chappell and Stanley. Therefore it is apparent that the Eleventh Circuit has misapplied Kitowski and, as a result, has misapplied Feres, Chappell and Stanley.

In light of this misapplication, it cannot be determined whether the Petitioner's grievance truly arose incident to his military service. Therefore, this Court should grant the petition for writ of certiorari and either determine whether the Petitioner's grievance arose incident to his military service or remand the matter for such a determination.

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A --- Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated and Decided November 9, 2001.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-15299

D. C. DOCKET NO. 99-02718-CV-B-NE

CLAUDE BURNETT,

PLAINTIFF-APPELLANT

Versus

RODGER PRIDMORE,
ALABAMA NATIONAL GUARD,

DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

(NOVEMBER 9, 2001)

Before TJOFLAT, BARKET and WILSON, Circuit Judges.

PER CURIAM:
AFFIRMED. See 11th Cir. R. 36.1.1

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[1] 11th Cir. R. 36-1 provides:
When the court determines any of the following circumstances exist:

(a) judgment of the district court is based on the findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, direct verdict, or judgment on the pleading is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Appendix B --- Opinion of the United States District Court for the Northern District of Alabama, Dated and Decided September 6, 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CLAUDE BURNETT,
PLAINTIFF,

V. **CASE NO. CV-99-B-2718-NE**

ROGER PRIDMORE and ALABAMA NATIONAL GUARD,
DEFENDANT.

MEMORANDUM OPINION

This case is before the court on Motions to Dismiss filed separately, but on the same grounds, by defendants Roger Pridmore ("Pridmore") and the Alabama National Guard ("National Guard") (collectively "defendants"). Plaintiff Claude Burnett ('plaintiff' or "Burnett") brought this case agaist defendants alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), as well as of 42 U.S.C. § 1981 ("section 1981"), 1983 ("section 1983"), and 1985 ("section 1985"). Upon consideration of the record, the submission of the parties, the

argument of councel, and the relevant law, the court is of the opinion that defendants' motions are due to be granted.

I. FACTS

Plaintiff, an Africian Americian, is employed by defendant Alabama National Guard under the command of defendant Pridmore. (Comp. ¶ 3(a)-(c); Pl.'s Mem. in Supp. Oo Resp. to Def's Mot. To dismiss (Pl.'s Brief') at 1-2.) Plaintiff, along with other members of his sqad, submitted an application for a vacant Command Sergeant Major position in the 279th Signal Battalion. (Compl. ¶ 3(a); Pl.'s Brief at 1-2.) According to plaintiff, Pridmore forwarded the applications of all candidates in his command with the exception of plaintiff's. (Comp. ¶ 3(a); Pl.'s Brief at 1-2.)

Plaintiff further alleges that Pridmore provided these candidates with recommendations even though some had less than two years of time in grade. (Comp. ¶ 3(b); Pl.'s Brief at 1.) Plaintiff claims that he has an impeccable military record, replete with significant accomplishments. (Pl.'s Brief at 1.) Plaintiff contends that all candidates whose applications were forwarded by pridmore were white; plaintiff was the sole black applicant. (Comp. ¶ 3(b): Pl.'s Brief at 1.)

Plaintiff alleges that he notified 142nd Signal Brigade of Pridmore's actions, " yet they took no action." (Comp. at ¶ 3(c).) Plaintiff also claims that the Command Sergeant Major and members of the staff of the Brigade "were aware of the problem." (Id.) Plainfiff admits that Pridmore had discretion to choose which candidates' applications to forward, based on the canidadates performance and qualifications. (Pl.'s Brief at 1.)

II. DISCUSSION

A. Standard for Motion to Dismiss.

In ruling on a motion to dismiss, the court must accept the allegations of the complaint as true and construe the fact alleged in the complaint in the light most favorable to the plaintiff. *Hunnings v. Texaco*, Inc., 29 F.3d 1480, 1484 (11th Cir. 1994.) "A complant should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Id; see also *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993). A complaint may be dismissed when the allegations demonstrate that the plaintiff does not have a claim. *Bruse v. Wade*, 537 F.2d 850, 852 (5th Cir. 1976).

In this case, both defendants move to dismiss on the same grounds: that Pridmore's decision to not forward plaintiff's application is a nonjusticiable military matter. (Nat'l Guard's Mot. To Dismiss ¶ 3-5.)

B. Title VII Claims

Uniformed members of the military, including members of the Natioal Guard, are subject to the military exception to Title VII. See *Doe v. Garrett*, 903 F.2d 1455, 1458 (noting the " well established case law excluding uniformed military personel from protetion under Title VII"); *Stinson v. Hornsby*, 821 F. 2d 1537, 1540 (holding that were a member of the National Guard is more military than civilian, ("no TitleVII action may be brought").

In *Stinson*, the Eleventh Circuit considered an action brought by a member of the Alabama National Guard alleging that he was discriminated against in promotion and discharged because of his race in violation of Title VII, section 1981, and section 1983. *Stinson*, 821 F. 3d at 1538-39. In addressing the Title VII claim, the court found:

Stinson, however, was a uniformed member of, and on full time military duty with, the Alabama National Guard. Title 10 U.S.C. ; 101 defines " armed forces" to include the Army, Navy,, Air Force, Marine Corps and Coast Guard. Under 10 U.S.C. § 3062(c)(1). The Army consists of:

> 1. The Reguard Army, the Army National Guard of the United States, the Army National Guard while in service of the United States, and the Army Reserves.

Other factors support the district court's determination that Stinson, for purposes of Title VII, should be considered military personel, rather than an employee of the state of Alabama: (1) Stinson wore a military uniform during periods of active dutyand\ or training; (2) He served on full time military duty; (3) he was paid by the government and not by the state of Alabama; and (4) he was subjuct to military discipline on a daily basis.

Thus, we conclude that Stinson, a member of the National Guard, is not an employee of the state of Alabama for purpose of Title VII.

* * * *

Our holding today is that members of the National Guard are generally employees of the state; but where the facts indicate that the person is on full time military duty and other

> factors indicate that the person is more military that civilian, no Title VII action may be brought.

Id. At 1539-40, 1540-41.

In this case, defendants maintain that Burnett's Title VI claims are barred. "Stinson controls in this case because Burnett's claims are exclusively military. He sought promotion from one enlisted grade so that he could fill a specific military positin, Command Sergeant Major of the 279th Battalion." (Def.'s [National Guard's] Mem. In Supp. Of Mot. To Dismiss at 3.)

In response, plaintiff distinguishes Stinson in three respects. First, plaintiff contends that unlike Stinson, he "is not deemed to be on active duty except for the periods of annual training, which last two weeks each year. All other times, Burnett is deemed to be on reserve duty." (Pl.'s Brief at 3-4.) Second, plaintiff contends that unlike Stinson, he wears his uniform during periods when he is not on active duty, such as drill periods. (Id. at 4.) Third, plaintiff contends that while the federal government compensates him for the two weeks he is on active duty the rest of the time " his compensation comes from a fund which is jointly funded by the State of Alabamaand the Federal Government." (Id.)

This court is unpersuaded by plaintiff's arguments. Binding precedent shows that National Guard positions of more questionable military status have been held to be military in nature. See *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980) (dismissing a civilian technician's claim of discriminatory termination from the National Guard because it "involves an internal military matter and implicates judicial concern over in appropriate intrusion into such transactions."). Further, by applying for promotion to a

Command Sergeant Major position, plaintiff was undisputedly acting in his capacity and engaging in military activity.

Thus, the court is of the opion that plaintiff's position and the challenged activity are both military in nature. Consequently, plaintiffs section Title VII are due to be dismissed for failure to stae a justiciable claim.1

C. Section 1981, 1983, and 1985 Claims

The threshold issue in an analysis of plaintiff's section 1981, 1983, and 1985 claims is determining which legal standard to apply. The Supreme Court, in *Feres v. United States*, 340U.S. 135 (1950), set forth an " incident to military service" standard applicable to Bivens-type actions. See *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983). However, the two step evaluation developed by the Fifth Circuit in *Mindes v. Seamon*, 452 F. 2d 197, 201 (5th Cir. 1971), may also be applicable to plaintiff's section 1981, 1983, and 1985 claims.

1. Development of the Feres/Chappell/Stanley Standard

In Feres, the Supreme Court held that the government was not liable unde the Federal Tort Claims Act for injuries to servicesmen "where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146.

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[1] To the extent plaintiff seeks Title IV relief against Pridmore, the claim is due to be dismissed because such relief is unavailable. *See Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (no individual liability under Title VII);

Thereafter, in *Chappell*, the Supreme Court addressed a Bivens-type action by five Navy enlisted men seeking damage and injunctive relief for alleged race discrimination in violation of their constitutional rights. *Chappell*, 462 U.S. at 297. Relying partially on *Feres*, the Court bluntly and broadly held that "enlisted military personnel may not maintain a suit to recover damages from a superier officier for alleged constitutional violations." Id. at 305.

In *Stanley*, the Supreme Court handed down a decision in yet another Bivens-typeaction by a member of the military. *Stanley*, 483 U.S. 669. The Court held that *Chappell* did not rule out all actions by enlisted men against the government; rather, the proper test for Bivens-type actions was whether the injuries "arise out of or are in the course of activity incident to service." Id. at 684 (quoting Feres, 340 U.S. at 146).

2. The Mindes Two-Step

After the Supreme Court set forth its "incident to service" standard in *Feres*, but before the standard was further clarified an *Chappell* and *Stanley*, the former Fifth Circuit considered an action brought by an Air Force Captain seeking declaratory and injunctive relief from a adverse personnel report. *Mindes*, 453 F. 2d at 198. Instead of using the *Feres* standard, the *Mindes* court established a two-step evaluation to determaine if a court should review internal military affairs. Id. at 201-02.2 Thereafter, the Eleventh

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[2] "The first step requires the court contemplating review to determine whether the plaintiff has alleged that the military acted contrary to the Constitution, applicable statutes, or its own regulations and whether the plaintiff has exhausted his administrative remedies. Once that determination is made, the court must then balance the substance of the allegations against the policy reasons that militate against review on four

Circuit followed Mindes as binding precedent. *Rucker v. Secretary of the Army*, 702 F.2d 966, 968 (11th Cir. 1993) (citing *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981)).

After *Chappell*, and one month after *Stanley*, the Eleventh Circuit considered an action by a discharged member of the Alabama National Guard alleging discrimination based on his race in violation of Title VII, 42 U.S.C.§ 1981, and 42 U.S.C. § 1983. *Stinson v. Hornsby*, 821 F. 2d 1537, 1539 (11th Cir. 1987). The *Stinson* court recognized that Title VII actions were foreclosed to members of the military and the National Guard, at least when their positions were primarily military in nature. Id. at 1539-40.

The *Stinson* court further held, however, that *Chappell* did not foreclose all causes of action, and that "uniformed members of the armed forces may assert that their constitutinal and statutory rights have been violated..." Id. at 140 (quoting *Gonzales v. Dept. of the Army*, 718 F.2d

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factors:

1. the nature and strength of the plaintiffs challenge to the military function; and

2. The potential injury to the plaintiff if review were denied;

3. The type and degree of anticipated interferencewith the military function; and

4. the extent to which the exercise of military expertise or discretion is involved."

Rucker v. Secretary of the Army, 702 F.d 966-70 (11th Cir. 1983) (citing *Mindes*, 453 F. 2d at 201-02).

926, 929 (9th Cir. 1983.). Thus as to Stinson's claims under section 1981 and 1983, the Elenth Circuit remanded the case for further analysis under the *Mindes* two-step evelution. Id. at 1540-41. The court specifically stated: "we find the approach adopted by *Mindes* binding in this action." Id at 1540. The Eleventh Circuit did not mention the *Stanley* decision in its opinion.

Therefore the Eleventh Circuit considered the claim of an HIV positive member of the Navel Reserve against the Navy and the Navel Reserve alleging violatios of the Rehabilitions Act and the Due Process Clause. *Doe v. Garrett*, 903 F. 2d 1455 (11th Cir. 1990). The Eleventh Circuit recognized the "well established caselaw excluding military personnel from protection under Title VII of Civil Rights Act, Id. at 1458, and applied the rationale in affirming the district court's dismissal of plaintiff's Rehabilitation Act claims. Id. at 1458-62. The court also affirmed the dismissal of the plaintiff's due process claim on the basis that plaintiff did not have a protected property or liberty interest. Id. at 1462-63.

In the alternative, the court examined the district court's finding that the due process claim was not reviewable under *Mindes*. Id. The court found that there was "nothing objectionable in the district court's application of *Mindes*, and we think it is clear under *Mindes* factors one and three, at least, review of Doe's due process claim in the case is disfavored." Id. at 1463. In a foot note however, the Eleventh Circuit expanded its view of the *Mindes* test:

> This court in *Stinson* took rather the severe approach of revising and remanding the district court's dismissal on the merits of a constitutional claimbecause the district court had not applied *Mindes* to determine whether

> the claim was reviewable in the first place. We reversed despite the fact that the issue on the merits was quite simple, the district court disposition appeared plainly correct, and the district court's consideration of *Mindes* on remand could not possiably have led to a different result. See *Stinson*, 821 F.2d at 1541-43 (Henderson, J., specially concurring) (criticizing *Mindes* and suggesting disposition of plainly meritless constitution claims "without resort to the cumbersome *Mindes* analysis") *accord Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1009-10 (8th Cir. 1989).
>
> We note that dispite the apparent assumptions of *Stinson*, this court and its prodecessor have not always applied *Mindes* in constitutional challenges to military personnel decisions. The former Fifth Curcuit, for example, failed to apply *Mindes* in *Sims v. Fox*, [505 F. 2d 857(5th Cir. 1974)(en banc)], decided only three years after *Mindes*. Furthermore, while *Mindes* refers to statutory as well as constitutional claims, it appears well established that *Mindes* need not be applied before reaching the merits of a statutory claim against the military. See *Stinson*, 821 F.2d at 1539-40; *Smith*, 763 F. 2d at 1324-25 (both rejecting statutory claims with out resort to *Mindes* analysis...

Id. at 1446 n. 15.

This was the last mention of *Mindes* in the Eleventh Circuit. Since *Doe v. Garnett*, the Eleventh Circuit has not

addressed a discrimination claim involving a member of the uniformed service. In addressing all other statutory and constitutional claims involving members of the uniformed services, the Eleventh Circuit has cnstantly relied on the "incident to service" standard set forth by *Feres, Chappell*, and *Stanley*. See, e.g., *Whitly v. United States*, 170 F 3d 1061, 1068 (11th Cir. 1999); *Jemenez v. United States*, 158 F. 3d 1228, 1229 (11th Cir. 1998); *Kitowski v. United States*, 931 F. 2d 1526, 1529 (11th Cire. 1991).

3. Feres/Chappell/Stanley/or Mindes?

Since *Stanley*, other circuits addressing discrimination, civil rights claims and other constitutional claims by members of the military, including the National Guard, have held that the *Feres/Chappell/Stanley* "incident to service" standard is the proper one to following determining the justiciability of such claims in the military context, abrogating the *Mindes* approach. *Wright*, 5 F.3d at 590, n.6; *Maddick v. United States*, 978 F. 2d 614, 615 (10th Cir. 1992); *Watson v. Arkansas National Guard*, 886 F. 2d 1004, 1006-07, 1009-10 (8th Cir. 1989). Moreover, the architect of the *Mindes* two-step, the Fifth Circuit, has abandonded that approach as well. *Crawford v. Texas Army Nat'l Guard*, 794 F. 2d 1034, 1036 (5th Cir. 1989); see also Wright, 5 F. 3d590 n.6 ("*Mindes* has been banished from its homeland").

In light of these post-*Stinson* developments, and in consideration of the Eleventh Circuit's stated reservations regarding the viability of *Mindes*, the the court is of the opinion that the "incident to service" standard is the correct rule to apply when determining whether an activity in the uniformed servive is military in nature, rendering it nonjusticiable. See *Neal v. Alabama Nat'l Guard*, 1997 WL 114910, * 2-* 4 (M.D. Ala. March 13, 1997) (reaching the same conclusion).

4. Application of the Feres/Chappell/Stanley Standard

In *Kitowski*, the Eleventh Circuit set forth three factors to ex amine when determining if a plaintiff's injuries " arise out of or are in the course of activityincident to military service" as set forth in *Feres, Chappell*, and *Stanley*: (1) the duty status of the service member, (2) the place where the injury occurred, (3) the activity the serviceman was engaged in at the time of injury. *Kitowski*, 931 F.2d 1528-29. Thus, the court must apply these factors to the challenged conduct to determine the justiciability of the claim.

In this case, the court is of the opinion that the claim is unjusticiable. When the Plaintiff applied for the position and Pridmore decided not to forward the application, they both engaged in purely military activity. The place of the injury and the activity in question were clearly "incident to" plaintiff's military service. Given the undoubtedly military nature of the challenged activity, the court is of the opinion that plaintiff can prove no set of facts which would entitled him to relief. Thus, under the "incident to service" standard set forth *Feres, Chappell*, and *Stanley,* plaintiffs claims under section 1981, 1983, and 1985 are due to be dismissed for failure to state a justiciable claim.

5. Application of the Mendes Two-Step

The court is also of the opinion that even if the *Mendes* two-step applied, plaintiffs section 1981, 1983, and 1985 would be nonjusticiable. The threshold requirement of the test "requires the court contemplating review to determine whether the plaintiff has alleged that the military acted contray to the Constitution, applicable statutes, or its regulations and whether the plaintiff has exhausted his

administrative remedies." *Rucker* , 702 F. 2d at 969 (citing *Mindes*, 453 F. 2d at 201-02) (emphasis added.) The court notes as a preliminary matter that plaintiffs has failed to allege such exhaustion, providing alternative grounds for dismissing his claims.3

If plaintiff survives the threshold analysis, the court must "balance the substance of the allegations against the policy reasons that militate against review based on four factors:" (1) the nature and strength of the plaintiffs challenge to the military fuction; (2) the potential injury to the plaintiff if review were denied; (3) the type and degree of anticipated interference with the military function; (4) the extent to which the exercise of military expertise or discretion is involved. *Rucker*, 702 F. 2d at 969-70 (citing *Mindes*, 453 F. 2d at 201-02).

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[3] Even if plaintiff could pursue a claim under Title VII, it would also be barred by his failure to exhaust administrative remedies. Section 717 of Title VII, 42 U.S.C. 2000e-16, is the 'exclusive pre-emptive administrative and judicial remedy for the redress of federal employment discrimination." *Brown v. General Service Administation,* 425 U.S. 820, 829 (1976); *Canino v. United States Equal Opportunity Commission,* 707 F. 2d 468, (11th Cir. 1983). Before an aggrieved employee may seek relief through the filing of a civil action in federal court, }717(c) requires that employee must first seek relief in the agency that has allegedly engaged in discrimination. *Brown v. GSA,* 425 U.S. at 832. This requirement is not a technicality; "[r]ather, it is part and parcel of the congressional design to vest in the federal agencies and officials engaged in hiring and promoting personnel ' primary responsibility' for maintaining nondiscrimination in employment." *Kisas v. Webster,* 707 F. 2d 524, 544 (D.C. Cir. 1983).

The court in the opinion that factors one, three, and fourof the second step of the Mendes test militate against review. Plaintiff's claims are tenuous (factor one)4, the military nature of plaintiff's position and the challenged activity means that review of such claims would interfere with military function (factor two), and the challenged employment decision (promotion of members of the military) involves the exercise of military expertise and discretion (factor four). Thus, even under the suspect *Mindes* analysis, plaintiff's section 1981, 1983, and 1985 claims are due to be dismissed for failure to state a justiciable claim.

III. CONCLUSION

Based upon the foregoing reasons, the court finds that both defendants' Motions to Dismiss are due to be granted. An order consistent with this opinion will be entered contemporaneously here with.

DONE this 6th day of September, 2000.

/s/ Sharon LoveLace BlackBurn
United States Disrtict Judge

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[4] " An obviously tenuous claim of any sort must be weighted in favor of declining review." *Mindes,* 453 F. 2d at 201.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

CLAUDE BURRNETT,

Plaintiff

v. **CASE NO. CV 99-B-2718-NE**

ROGER PRIDMORE and ALABAMA NATIONAL GUARD,

Defendants.

ORDER

In accordance with Memorandum Opinion entered contemporaneously herewith, the Motions to Dismiss filed by defendants Roger Pridmore and the Alabama National Guard are **GRANTED**. This action is hereby **DISMISSED WITH PREJUDICE.** Cost are taxed against the plaintiff.

DONE this_____day of September, 2000.

_____

/s/ SHARON LOVELACE BACKBURN
United States District Judge

28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 (a) (3)

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. § 2000-e (a), (b), (m)

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawfulemployment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer

for employment any individual on the basis of his race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.